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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of )

APR 18 2005

Petition for Rulemaking to Amend )  
47 C.F.R. §§ 76.64, 76.93, and 76.103 )

Federal Communications Commission  
Office of Secretary

MB Docket No. \_\_\_\_\_

RM No. 11203

Retransmission Consent, )  
Network Non-Duplication, and )  
Syndicated Exclusivity )

OPPOSITION TO AMERICAN CABLE ASSOCIATION  
PETITION FOR RULEMAKING

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## Summary

The National Association of Broadcasters, CBS Television, The Walt Disney Company, NBC Telemundo License Co., and the affiliate associations of the ABC, CBS, NBC and Fox networks all urge the Commission to deny the petition for rulemaking filed by the American Cable Association ("ACA"). ACA's petition provides no rational basis on which to launch a rulemaking proceeding. Its petition seeks to overturn the Commission's well-reasoned, time-tested and effective program exclusivity and retransmission consent rules to provide commercial benefit for ACA's membership. It is based on misleading and irrelevant arguments that do not provide any justification for the change it proposes and would violate the intent of Congress.

Contrary to ACA's unsupported assertions, there are no "changed conditions" to justify the Commission's intervention in the marketplace in favor of ACA's membership. In the past ten years, for example, cable has gained viewership at the expense of the broadcasting industry, not the other way around. Broadcast revenue has not grown markedly in the small markets about which ACA purports to be concerned -- in smaller markets, in fact, broadcast revenue has increased only slightly in recent years. In contrast, cable subscriber charges and revenues (including local advertising revenue, for which cable competes with broadcasters), have increased dramatically across the board. There is no evidence of systemic abuse of market position by broadcasters; in fact, the contrary is true. Cable has had the upper hand in retransmission consent negotiations since the first negotiation in 1992.

On the merits, ACA's proposals are contrary to long-established Congressional and Commission policy. The Commission has long recognized that its network non-duplication and signal carriage rules are the primary means by which local television markets are protected against unrestricted importation of distant signals. The Commission has twice rejected the restrictions on its programming exclusivity rules that ACA advocates, and it should do so again. There is, moreover, no basis for the Commission to restrict the geographic arrangements that networks and their affiliates have carefully crafted to foster the effective national partnership for the distribution of television network programming on which our system of locally-oriented broadcasting is based. Any legitimate interests of ACA's members are protected fully by the Commission's existing rules limiting retransmission consent and, of course, by the antitrust laws.

ACA's petition is an attempt to place a thumb on the scale of every retransmission consent negotiation so that ACA's members can obtain valuable programming rights for free. That was clearly not the intent of Congress in passing and reaffirming the retransmission consent regime, and it would be contrary to the statute to adopt the proposals ACA suggests. We urge the Commission to reject ACA's petition completely and expeditiously.

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**OPPOSITION TO AMERICAN CABLE ASSOCIATION  
PETITION FOR RULEMAKING**

The National Association of Broadcasters ("NAB"), the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"),<sup>1</sup> CBS Television ("CBS"), The Walt Disney Company ("Disney"), and NBC Telemundo License Co. ("NBC"), hereby oppose the above-captioned Petition for Rulemaking ("Petition") filed by the American Cable Association ("ACA"). ACA seeks to cripple the program exclusivity and retransmission consent rules as applied to some or all of its members and to restrict broadcast stations' freedom of contract by essentially assuring that ACA's members obtain some of their most valuable programming for free. ACA suggests that its proposed rule changes are a modest attempt to create competition that will protect its members from unreasonable retransmission consent demands. In fact, what ACA seeks are rule changes that would

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<sup>1</sup> NAB is a nonprofit, incorporated association of radio and television broadcast stations which serves and represents the American broadcast industry. The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

overturn free market principles by enabling its members, in many circumstances, to obtain all their network programming for free. This would be so even if the cable operator were part of a multi-billion dollar cable conglomerate and even if the network station from which it would be able to obtain this free programming was a small family-run company.

As an initial matter, ACA states that “[m]ore than half of ACA’s members serve fewer than 1,000 subscribers.”<sup>2</sup> What this means is that most of ACA’s members are small cable operators that are already exempt from the Commission’s network non-duplication and syndicated exclusivity rules.<sup>3</sup> It also means that these small cable operator exceptions apply to a *majority* of rural cable operators.<sup>4</sup> It must further be recognized that these exceptions represent a derogation of privately negotiated contracts between, and the property rights of, television stations and their program suppliers. Thus, the Commission already provides small cable operators government benefits not extended to their competitors.

#### **I. NO “CHANGED MARKET CONDITIONS” SUPPORT ACA’S RULEMAKING PETITION**

ACA’s Petition to change various rules relating to program exclusivity and retransmission consent relies on three alleged “changed market conditions” that have

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<sup>2</sup> ACA Petition at 4.

<sup>3</sup> See 47 C.F.R. §§ 76.95(a), 76.106(b).

<sup>4</sup> As of December 2004, at least 53% of all cable systems (*i.e.*, at least 4481 of 8409 cable systems) serve less than 1000 subscribers and therefore are not subject to the network nonduplication and syndex rules. See TELEVISION & CABLE FACTBOOK 2005, at F-2.

occurred since the Commission last considered these rules.<sup>5</sup> As shown below, however, these purported market changes are irrelevant to the rule changes ACA requests and provide no justification for them.

ACA's first alleged "changed condition" is that advertiser-supported commercial broadcasting has now become a "mature financially robust industry" and, hence, broadcasters no longer need meaningful retransmission consent and program exclusivity rights with respect to "small cable companies."<sup>6</sup> To support its argument, ACA presents statistics showing an increase in the number of broadcast stations and in advertising revenues since 1992-1994. But this analysis is seriously flawed in numerous respects. First, it fails to present the full picture. No mention is made, for example, of the fact that between 1992 and 2003 cable's total revenue increased by 147% from \$20.760 billion to \$51.245 billion.<sup>7</sup> Nor does it recognize that, according to the Commission's 2004 Price Survey, the average monthly cable rate increased 5.6% and 3.6% for non-competitive and competitive cable systems, respectively, well ahead of the rate of inflation, as the Consumer Price Index increased only 1.1%.<sup>8</sup> In both percentage and absolute terms, cable's advertising revenues (for which cable competes with broadcasters) have skyrocketed since 1992, as have audience shares for cable

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<sup>5</sup> See ACA Petition at v.

<sup>6</sup> ACA Petition at 18.

<sup>7</sup> See National Cable & Telecommunications Association, "Cable Developments 2004" ("NCTA Cable Developments"), at 14; *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13 (released Feb. 4, 2005) ("*Eleventh Annual Report*") at ¶ 19.

<sup>8</sup> See *Eleventh Annual Report* at ¶¶ 26-27.

programming—at the expense of broadcasters. Between 1992 and 2003, cable revenue from local advertising increased 367% and is estimated to have increased another 13.5% in 2004.<sup>9</sup> In contrast, broadcasters' local advertising revenue increased only 56% between 1993 and 2003 and a mere 0.7% between 2003 and 2004.<sup>10</sup> Cable has also gained viewership at the expense of broadcasters.<sup>11</sup> In short, the one-sided view of the industry that ACA would have the Commission adopt is not supported by the facts.

Another significant problem with ACA's argument is that it fails to provide any specific data on broadcasters in the very markets in which ACA claims to be seeking relief—which is compounded by the fact that ACA never says precisely which markets those are in the first place. If, for example, the preponderance of the alleged growth took place in New York, Los Angeles, and Chicago, it would be irrelevant to ACA's Petition. In fact, the average rate of revenue growth between 1997 and 2003 for broadcasters in the smallest markets ranked 100-210 was just 1.84%.<sup>12</sup> The Commission itself has expressly recognized that broadcasters, especially those in small and medium markets, are currently facing severe financial pressures.<sup>13</sup>

ACA has thus utterly failed to make the case for this first “changed condition,” either with respect to the actual stations that would be impacted by its proposed rule

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<sup>9</sup> See *id.* at ¶ 19; NCTA Cable Developments at 15.

<sup>10</sup> See *Eleventh Annual Report* at ¶ 14; Mediaweek, “2004 Marketers Guide to Media,” at 9-12.

<sup>11</sup> See, e.g., *Eleventh Annual Report* at ¶ 77; NCTA Cable Developments at 17.

<sup>12</sup> See BIA Media Access Pro Database.

<sup>13</sup> See *2002 Biennial Regulatory Review, Report and Order*, 18 FCC Rcd 13620 (2003), at ¶ 201.



changes or for the implied impoverished conditions of its members. In fact, there is evidence to suggest that the *relative* bargaining position between cable and broadcasters is unchanged or *worse* for broadcasters since 1992 because, in many so-called “rural markets,” a relatively small broadcaster must negotiate with a cable operator owned by a huge cable conglomerate. This is exemplified by the fact that, while a majority of cable subscribers in hundred-plus markets are served by one of the five largest cable MSOs (as noted in Appendix A), only 3% of the television stations in these markets are owned by one of the top ten television station groups.<sup>14</sup> Moreover, in the majority of these markets, there continues to be just one cable operator—the same state of affairs that existed in 1992 when Congress, in part for this very reason, adopted retransmission consent.

The second alleged “changed circumstance” upon which ACA relies to justify its proposed rule changes consists of two parts -- consolidation in the broadcast industry and the so-called “must have” nature of network programming. Again, ACA’s analysis is extraordinarily flawed.

With respect to consolidation, ACA completely ignores the massive consolidation and “clustering” in which the cable industry has engaged during this period,<sup>15</sup> as well as the impact those developments have had on small broadcasters who must deal with these cable behemoths. In June 2004, the four largest cable operators served approximately 58% of all U.S. cable subscribers.<sup>16</sup> Once again, ACA simply fails to tie any purported

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<sup>14</sup> See BIA Media Access Pro Database.

<sup>15</sup> In 2003, more than 53.6 million cable subscribers were served by 168 regional clusters. See *Eleventh Annual Report* at ¶ 15.

<sup>16</sup> See *id.* Most recently, Comcast and Time Warner have announced their intention to acquire Adelphia’s systems.

adverse consequences of broadcaster consolidation to the vast majority of the markets where its members operate. Moreover, in these small and medium sized markets, the FCC continues to greatly limit consolidation by retention of a strict duopoly rule.<sup>17</sup>

Speaking in broad generalities, ACA makes the assertion that the Commission has recently concluded that “network stations now threaten the survival of small cable companies.”<sup>18</sup> To support its claim, ACA cites the Commission’s *Order* approving News Corp.’s acquisition of DirecTV. But the conditions imposed in that case relate not to News Corp.’s role as a broadcaster but rather to the issue of News Corp.’s regional sports networks and its ability and incentives as an MVPD competitor to small cable operators to withhold programming from those cable operators.<sup>19</sup> One is left only to guess how this relates, for example, to the alleged ability of Duhamel Broadcasting Enterprises, owner of ABC television affiliates in Rapid City, Cheyenne, and Scottsbluff,<sup>20</sup> to threaten “the survival of small cable companies.”

ACA also broadly overgeneralizes that, because of media consolidation, “retransmission consent negotiations now pit small cable companies against media conglomerates with far greater resources.”<sup>21</sup> Again, the implication is that these

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<sup>17</sup> 47 U.S.C. § 73.5555(b).

<sup>18</sup> ACA Petition at 21.

<sup>19</sup> See *General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd 473, 552 (2004) (“*News Corp. Order*”).

<sup>20</sup> See Comments of Duhamel Broadcasting, MB Docket No. 05-28, at 1.

<sup>21</sup> ACA Petition at 22.

“conglomerates” are using their resources in an unfair or unreasonable manner. Evidence to support these allegations is flimsy.

For example, ACA continues to cite to eleven examples provided in its December 2002 “First Supplement” to ACA’s Petition for Inquiry into Retransmission Consent Practices. While not conceding that any of these examples represent unfair or abusive conduct, it is significant that seven of the eleven examples involved Fox-owned and operated stations as to which the conditions imposed by the Commission as part of its approval of News Corp.’s acquisition of DirecTV now apply. These conditions already provide much of the relief ACA claims its members need.<sup>22</sup> The ACA Petition fails to address the ramifications of these conditions imposed in 2004 on the complaints it raised in 2002.

The remaining four examples of alleged “abuse” involved Disney/ABC-owned and operated stations. The allegation is that Disney engaged in “take it or leave it tying arrangements.”<sup>23</sup> Of course, Disney has consistently denied this allegation, stating unequivocally that it always offers MVPDs cash alternatives.<sup>24</sup> Ironically, one of ACA’s own “tying” examples specifically concedes that Disney, in fact, offered an all-cash alternative.<sup>25</sup>

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<sup>22</sup> See, e.g., *News Corp. Order* at ¶ 224 (stating that for MVPDs with fewer than 5000 subscribers, News Corp. is required either to elect must carry or to negotiate retransmission consent for its owned and operated stations “without any requirement for cash compensation or carriage other than the broadcast signal”).

<sup>23</sup> ACA’s First Supplement at 6.

<sup>24</sup> See, e.g., Comments of The Walt Disney Company, MB Docket No. 05-28, at 2; Reply Comments of The Walt Disney Company, MB Docket No. 05-28, at 5-7.

<sup>25</sup> See ACA First Supplement at 9.

ACA's current Petition cites only two examples where "powerful media conglomerates" allegedly sought to maintain artificial barriers to competition.<sup>26</sup> Again, without conceding the validity of ACA's allegations, these two instances out of the thousands of local station-cable operator relationships hardly supports either ACA's allegations of industry-wide systemic abuse by television stations or their networks or the excessive remedies ACA proposes. Indeed, in one of these cases, an out-of-market cable operator was able to claim the right to redistribute all of a station's programming – even that programming for which the station did not have the right to grant retransmission consent under the relevant programming agreement. Moreover, it is significant to note that while ACA crows about the lower retransmission consent fees its members were able to obtain in these two instances, in neither example is there *any* evidence that consumers benefited from these deals by reduced rates.<sup>27</sup>

As part of the second so-called "significant change" cited in the Petition, ACA asserts that network programming in today's video marketplace is "must have."<sup>28</sup> ACA does not explain, however, why broadcast network programming in 1992-1994 was not "must have" programming for cable, but it is now. Again, if anything, the evidence suggests the opposite. For example, competition to broadcast network programming

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<sup>26</sup> See ACA Petition at 26-32.

<sup>27</sup> ACA repeatedly suggests that constraints in what broadcasters can obtain for retransmission consent will result in controlling cable rate increases. The GAO, however, concluded in late 2003 that retransmission consent has no effect on cable rates. See U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003).

<sup>28</sup> ACA Petition at 23.

from cable and satellite programming networks has grown to include 388 national non-broadcast programming networks,<sup>29</sup> and, according to NCTA, the seven over-the-air networks accounted for a 38 share of all day viewing in 2003 while all non-broadcast networks accounted for a 63 share for all day viewing.<sup>30</sup>

Looking behind this counter-intuitive proposition about the greater importance of network programming today, it appears that ACA's real concern is that small cable operators, who until recently had no competition from other MVPDs in their local service areas, now face **competition** by DBS, and, in the days ahead, from telephone companies. It wants its members to be treated more favorably than DBS and telephone company competitors to give its members a competitive advantage. We respectfully submit that this is not a reasonable basis for altering these rules.

As important as broadcast television may be in the everyday lives of Americans, neither Congress, the Commission, nor the courts has suggested that any company should be given mandatory access to a broadcast station's signal at no charge so that it may be retransmitted and resold by a third party for profit. The notion that any MVPD, including a small cable operator, "must have" certain broadcast station programming for the purpose of resale is absurd, as would be the notion that cable operators and satellite carriers should be entitled to free access to ESPN, CNN, Fox News, MTV, and other cable/satellite program services. While it is true that much broadcast television programming is popular, the ability of local television stations to negotiate consideration from third parties who retransmit and charge their customers for that programming does

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<sup>29</sup> See *Eleventh Annual Report* at ¶ 15.

<sup>30</sup> See *id.* at ¶ 25.

not confer "market power" on local stations in an economic sense. As the Commission recently stated in its *A la Carte Programming Report* to Congress:

To the extent the Commission discussed the "market power" that might reside in the combined entity [in the News Corp./DIRECTV merger], it was *not* passing upon the competitive balance of negotiating power that normally exists between broadcasters/ programmers and MVPDs. All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity.<sup>31</sup>

Inasmuch as even small cable operators can deliver dozens, if not hundreds, of channels of television program services in every market in which they operate while a local television broadcast company can only own or control one or, at most, two stations in a market, it is a stretch to suggest that, somehow, local television stations possess "market power" in negotiating with cable operators. In fact, there is an abundance of popular television programming substitutes available on cable/satellite-only networks, including ESPN, CNN, Fox News, Lifetime, USA, The Discovery Channel, A&E, and dozens of others. It has recently been reported that cable viewing for the first time ever exceeded the seven broadcast networks in a sweeps period, achieving a 49.4 share in primetime, compared with a 48.6 share for broadcast viewing, in the February 2005 sweeps.

Plainly, ACA's concept of "must-have" programming is simply programming its members "wish" to have for free so they can resell it to their subscribers for profit.

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<sup>31</sup> Report on the Packaging and Sale of Video Programming Services to the Public (FCC Nov. 18, 2004) ("*A la Carte Programming Report*"), at 70 (emphasis added).

In the end, the short answer to ACA's complaint about access to broadcast programming is that there is nothing to prevent its members from developing equally popular programming. For the government to give that programming to small cable operators and other MVPDs for free would create an economic disincentive for these MVPDs to develop competitive programming of their own, thus depriving viewers of the diversity of viewing options that would flow from the development of competitive programming. The competitive marketplace is at work, and small cable operators and other MVPDs should not be given *free* access to programming developed and paid for by their broadcast competitors. Nothing could be more basic, more logical, or fairer and more equitable.

The third so-called "change in market condition" cited in ACA's Petition is that broadcasters are allegedly targeting the "small cable sector" with cash demands exceeding \$860 million for the next round of retransmission consent negotiations.<sup>32</sup> Even the most cursory of analyses reveals the fanciful nature of this number.<sup>33</sup> *First*, this "calculation" assumes there is a network affiliate for each major network serving all 210 markets; this is not true, as many smaller markets do not have a full complement of the four major networks.<sup>34</sup> *Second*, the "calculation" assumes that the eight million subscribers allegedly affected by these demands are all in markets that have a full complement of affiliates of the four major networks; but ACA nowhere provides any evidence of this or even which markets are purportedly affected. *Third*, the "calculation"

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<sup>32</sup> See ACA Petition at 24.

<sup>33</sup> See *id.* at 25 n.67.

<sup>34</sup> In fact, sixty-two DMAs do not have a full complement of affiliates of the four major networks. See BIA Media Access Pro Database.

assumes that *every* affiliate in *every* market will opt for retransmission consent, which history shows is not true. *Fourth*, the "calculation" assumes not only that each affiliate will ask for, but that each affiliate will actually obtain, \$0.75 per subscriber; but ACA itself provides contrary evidence that this is not true.<sup>35</sup> *Fifth*, the "calculation" assumes that ACA's members must, or legitimately should, automatically pass any retransmission consent fees on to its subscribers. *Sixth*, and finally, the "calculation" fails to compare this or any other number with projected increases in subscriber fees for any other cable programming services.

In connection with its absurd \$860 million price tag claim, ACA asserts, without foundation, that broadcasters with whom its members must negotiate for retransmission consent face no "market discipline" with respect to the deals they propose. First, and foremost, there is the "discipline" imposed by the fact that 71.6% of MVPD subscribers still receive their local signals from cable and, of all television households, cable still commands a 61% penetration rate.<sup>36</sup> Hence, the Commission's prior conclusion that "there are incentives for both parties to come to mutually-beneficial arrangements"<sup>37</sup> is as true today as it was ten years ago. Second, with respect to the more than half of ACA's members with fewer than 1,000 subscribers, and additional numbers of its larger members in markets where out-of-market network stations are significantly viewed,<sup>38</sup> the

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<sup>35</sup> See ACA Petition at 24 (four of the seven *opening* offers are less than \$0.75; in fact, the straight average of the opening offers is only \$0.61).

<sup>36</sup> See *Eleventh Annual Report* at ¶¶ 7, 14.

<sup>37</sup> *Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6746 (1994).

<sup>38</sup> Program exclusivity protections are not enforceable against cable systems serving fewer than 1,000 subscribers or against the importation of significantly viewed



already available option of the cable operator to import an out-of-market network station serves not only as "market discipline," it virtually eliminates the local network station's ability to obtain any compensation for retransmission consent.<sup>39</sup>

**II. ACA'S PROPOSAL THAT STATIONS IN SMALL MARKETS MUST CHOOSE BETWEEN PROGRAM EXCLUSIVITY RIGHTS AND RETRANSMISSION CONSENT WITHOUT ANY FORM OF COMPENSATION SHOULD BE REJECTED**

ACA proposes that local stations should not be permitted to exercise program exclusivity rights if they choose to elect retransmission consent. This proposal is contrary to long-established congressional and Commission policy recognizing the importance of program exclusivity rules and, indeed, would undermine the locally-based system of television broadcasting established by Congress and implemented by the Commission.

In adopting the current network non-duplication rules, the Commission stated that these rules—"in conjunction with our signal carriage rules—constitute the primary means of protecting local network affiliated stations, and thereby our basic conventional television allocations policies from the potentially harmful effects of unrestricted cable carriage of distant signals."<sup>40</sup>

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signals, regardless of cable system size. See 47 C.F.R. §§ 76.93(f), 76.95(a), 76.106(a), 76.106(b).

<sup>39</sup> This is demonstrated by ACA's own example of Valley Cable and WMAZ where the cable operator's carriage of a significantly viewed signal quickly resulted in a retransmission consent deal with in-market station WMAZ. See ACA Petition at 30-31.

<sup>40</sup> *Memorandum Opinion and Order*, 56 F.C.C.2d 210, 214 (1975); see also *First Report and Order*, 52 F.C.C.2d 519, 544 (1975).

The Commission's reason for creating a 55 mile zone of protection for network affiliates in hundred-plus markets was

[t]hat a larger zone of protection was warranted in order to compensate for the differences in population density patterns which exist outside large urban areas. Therefore, an additional 20 miles zone of protection was provided for stations located in smaller markets.<sup>41</sup>

Specifically, the Commission determined that this extra zone of protection was needed to "adequately protect the audience base of such stations."<sup>42</sup>

None of the facts or premises underlying the Commission justification for providing this extra zone of protection has changed since 1975. As demonstrated in Appendix B, in 2004 there was an average of 98 television households per square mile in the top 100 DMAs, while there was an average of only 25 television households per square mile in DMAs 101 to 210. Moreover, to the extent that affiliates in hundred-plus markets are less likely to be profitable and usually operate on a slimmer profit margin,<sup>43</sup> even the erosion of a few percentage points of revenues caused by a reduction in the zone within which they are able to exercise non-duplication protection will undoubtedly affect the service they can provide to their communities. Thus, the need to maintain strong and

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<sup>41</sup> *Id.* at 25.

<sup>42</sup> *Id.*

<sup>43</sup> As illustrated in Appendix C, in 2004 the profit margins for the average affiliate station in markets 101-125, 126-150, 151-175, and 176-210 were 8.4%, 0.6%, 10.6%, and 1.4%, respectively, and the average pre-tax profits for affiliates in these markets were \$616,000, \$30,000, \$475,000, and \$39,000, respectively. NAB has also previously demonstrated that low-rated network affiliates in these smaller markets are actually losing money, not earning profits. See 2002 Biennial Regulatory Review, Report and Order, 18 FCC Rcd at 13698.

effective program exclusivity protection for affiliates in hundred-plus markets has, since 1975, become even more critical.

ACA's Petition seeks to create the impression that "rural cable operators" necessarily equate to small "mom and pop" operators. In fact, as demonstrated in Appendix A, a review of the top five cable systems in DMAs ranked 101-210 reveals that more than half of the subscribers served by cable in these markets are subscribing to one of the five largest MSOs in the country. Accordingly, any analysis of competition affecting "rural cable operators" must take into account that many of these cable operators are huge billion dollar companies that are negotiating with "mom and pop" broadcasters. Accordingly, the Commission may not properly assume that it is the cable operator which is the disadvantaged party in rural markets.

ACA's proposal that local stations should not be permitted to exercise program exclusivity rights if they choose to elect retransmission consent is simply a blatant attempt to stack all regulatory cards in cable's favor. A cable operator will have little incentive to negotiate in good faith with the local broadcaster electing retransmission consent if the cable operator can, at any time, attempt to secure all the station's non-locally produced programming from a distant signal. Moreover, it is not the FCC that has granted the local station program exclusivity; rather, it is the station's program suppliers. The FCC's rules merely provide the mechanism to *enforce* those exclusivity rights, bought and paid for in the marketplace, and there is no valid policy reason to emasculate such rights because a station opts for retransmission consent.

The consequences of adopting any such proposal would be particularly dire for stations in small and medium sized markets. For all stations, as discussed above, the

program exclusivity rules "constitute [a] primary means of protecting local network affiliated stations and thereby our basic conventional television allocations policies from the potentially harmful effects of unrestricted cable carriage of distant signals."<sup>44</sup> For stations in small and medium sized markets, many of whose markets may also be served by small cable companies, the program exclusivity rules are also needed to "adequately protect the audience base of such stations."<sup>45</sup>

Moreover, the Commission has at least twice rejected ACA's proposal for at least two reasons.<sup>46</sup> Its first reason for doing so was that "Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights whether or not these stations are actually carried on a cable system."<sup>47</sup>

The Commission's second reason for rejecting ACA's proposal was that

[w]e also do not find that there is a conflict between retransmission consent rights and exclusivity rights. Network nonduplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.<sup>48</sup>

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<sup>44</sup> *Memorandum Opinion and Order*, 56 F.C.C.2d 210, 214 (1975); *see also First Report and Order*, 52 F.C.C.2d 519, 544 (1975).

<sup>45</sup> *Id.*

<sup>46</sup> *Report and Order*, 8 FCC Rcd 2965, 3006 (1993) ("*93 Report and Order*"); *Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6746 (1994) ("*94 MO&O*").

<sup>47</sup> *93 Report and Order*, 8 FCC Rcd at 3006 (citation omitted).

<sup>48</sup> *94 MO&O*, 9 FCC Rcd at 6746 (citation omitted).

In previously rejecting the exact same arguments raised again by ACA in its current Petition, the FCC correctly observed:

We believe that there are incentives for both parties to come to mutually-beneficial arrangements. Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming. We note that there are only limited situations where local stations are not carried. Therefore, the dire consequences predicted do not exist.<sup>49</sup>

The speculative threat of unserved subscribers resulting from a broadcaster's exercise of both retransmission consent and program exclusivity rights that it negotiated and paid for in an arm's-length negotiation with its program suppliers was as unsubstantiated in 1993 and 1994 as it is now. The FCC should reject it now just as it did then.

### **III. ACA'S PROPOSAL THAT BROADCASTERS' FREEDOM TO CONTRACT SHOULD BE CURTAILED BY A GOVERNMENT FIAT PROHIBITING CERTAIN GEOGRAPHIC LIMITATIONS IN NETWORK AFFILIATE AGREEMENTS SHOULD BE REJECTED**

ACA seeks to place restrictions on agreements or arrangements broadcasters may enter into with third parties, such as networks, program suppliers, or others, relating to a station's grant of retransmission consent.<sup>50</sup> The Commission should reject these

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<sup>49</sup> *Id.*

<sup>50</sup> See ACA Petition at 15-17.

proposed unwarranted governmental intrusions into private contractual relations. Most of ACA's objections appear to relate to contracts between stations and their program suppliers that limit geographically a station's right to grant retransmission consent. These types of provisions serve legitimate business and public policy goals and should not be restricted.<sup>51</sup>

As demonstrated in NAB's Comments and Network Affiliates' Reply Comments in the Commission's Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market, MB Docket No. 05-28,<sup>52</sup> the

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<sup>51</sup> ACA's assertion that these provisions violate a broadcaster's "good faith" negotiating obligations are without merit. There are no such obligations for out-of-market carriage of stations by MVPDs. As the Commission has recently observed, "[s]ignificantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive." *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligations*, Notice of Proposed Rule Making, FCC 05-49 (released Mar. 7, 2005), at ¶ 8. Moreover, 47 U.S.C. § 340(d)(1) and (2) provides that "[c]arriage of a [significantly viewed] signal under this section is not mandatory" and that "eligibility of the signal of a station to be carried under this section does *not* affect any right of the licensee of such station to grant (*or withhold*) retransmission consent under section 325(b)(1)" (emphases added). *See also* H.R. REP. 108-634 (2004), at 14 (legislative history providing that "[c]able operators are under no obligation to carry in a local market a distant significantly viewed signal, and the Committee intends satellite carriage of such a distant signal in a local market to be similarly voluntary. . . . Cable operators must obtain retransmission consent to carry significantly viewed signals into a local market and the Committee intends the same obligation to apply to satellite."). It is plain, then, that MVPDs are under no obligation to retransmit out-of-market signals and broadcast stations are under no obligation to grant retransmission consent. Because there are no MVPD obligations to retransmit and no broadcaster obligations to grant retransmission consent to permit carriage, it follows that there cannot be any good faith bargaining obligations to attempt to come to an agreement that neither the MVPD nor the broadcast station has any legal obligation to enter into.

<sup>52</sup> NAB Comments, MB Docket No. 05-28, at 5-11; Network Affiliates Reply Comments, MB Docket No. 05-28, at 40-45.

NAB and Network Affiliates hereby incorporate into this Opposition both their respective comments and reply comments in MB Docket No. 05-28 and request that those

need for strong and effective rules enabling television stations to preserve the exclusivity of programming in their local markets is absolutely essential to preserve localism and to enable broadcasters to fulfill their public service obligations. Both Congress and the Commission have repeatedly recognized and promoted the importance of stations' ability to obtain and enforce program exclusivity with respect to all MVPDs by severely limiting their ability to import duplicative programming into a local station's market.

An essential element in preserving local program exclusivity, and, indeed, the network-affiliate system itself, are provisions in network affiliation agreements and other program contracts that limit a station's right to grant retransmission consent in ways that could effectively destroy local program exclusivity by allowing a few stations to cannibalize other stations' markets. Such provisions not only provide legitimate protection to local stations, they also serve the interests of program suppliers to maximize the commercial exploitation of their product by, in essence, creating local franchises.<sup>53</sup> Indeed, ACA's argument, taken to its logical conclusion, would have prevented the development of McDonald's, 7-Eleven, Coca-Cola, and countless others, each of which has depended on exclusive distribution in a geographically limited area. As the examples of the broadcasting and other consumer-oriented industries demonstrate, consumers are the ultimate beneficiaries of exclusive distribution arrangements.

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pleadings be made a part of the record in this proceeding, as the basic arguments and principles in the two proceedings are the same.

<sup>53</sup> See, e.g., Reply Comments of MPAA, MB Docket No. 05-28, at 2-3; Reply Comments of The Walt Disney Company, MB Docket No. 05-28, at 17-21.

#### IV. EXISTING COMMISSION RETRANSMISSION CONSENT RULES AND ANTITRUST LAWS PROVIDE ACA MEMBERS WITH ADEQUATE PROTECTIONS

In asserting its various complaints about the retransmission consent process, ACA fails adequately to explain why the many existing Commission rules limiting retransmission consent and protecting against abuses, together with the antitrust laws, are inadequate.

The Commission's rules regarding retransmission consent already protecting ACA's members include (1) a prohibition against granting retransmission consent on an exclusive basis<sup>54</sup>; (2) an affirmative obligation that the broadcaster negotiate in good faith, together with a mechanism to enforce this obligation<sup>55</sup>; (3) the requirement that different retransmission consent terms and conditions with different MVPDs must be based on "competitive market conditions" and that any terms and conditions, "the effect of which is to hinder significantly or foreclose MVPD competition," presumptively violate this requirement<sup>56</sup>; (4) with respect to Fox and its stations, an extensive list of special conditions, some of which specifically address ACA's concerns<sup>57</sup>; and (5) an exemption from program exclusivity rules for cable systems with fewer than 1,000

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<sup>54</sup> 47 C.F.R. § 76.64(1).

<sup>55</sup> 47 C.F.R. § 76.65.

<sup>56</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5470 (2000) ("Good Faith Order").

<sup>57</sup> See *News Corp. Order* at ¶ 218-226.



subscribers<sup>58</sup>—an exemption which more than half of ACA's members are already fully entitled to.<sup>59</sup> Above and beyond all of these rules, there are, of course, the antitrust laws.

For years, these limitations, exemptions, and conditions on retransmission consent, together with cable's dominant status, resulted in one commentator observing that "[f]or most broadcast stations, the [retransmission consent] rules have been a total bust."<sup>60</sup> Now that the long-awaited competition to cable's former monopoly status has finally begun to develop, resulting in broadcasters having some genuine negotiating leverage in the marketplace, ACA suddenly finds these existing protections inadequate and seeks a whole new set of government-imposed limitations and restrictions on broadcasters' freedom to contract. These new limitations are sought not to enhance competition between ACA's members and their competitors, but rather to eliminate broadcasters' ability to achieve the true value of their retransmission consent rights in the marketplace. Such limitations, which are in derogation of broadcasters' common law rights to contract, should not be adopted absent very strong public policy justifications,<sup>61</sup> which ACA has failed to—and cannot—provide.

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<sup>58</sup> See 47 C.F.R. §§ 76.95(a) and 76.106(b).

<sup>59</sup> See ACA Petition at 4.

<sup>60</sup> Doug Halonen, "Looking Back at Retransmission Consent," *ELECTRONIC MEDIA* (Mar. 4, 2002).

<sup>61</sup> Cf. *Good Faith Order*, 15 FCC Rcd at 5453.

**V. ACA'S CHARACTERIZATION OF CONGRESSIONAL INTENT RELATING TO RETRANSMISSION CONSENT IS SKEWED, AND ADOPTION OF ITS PROPOSALS WOULD CREATE INEQUITABLE RESULTS**

According to ACA's rendition of the "substantial history" of retransmission consent regulations, Congress and the Commission intended the government to be a referee to "protect broadcasters from unfair cable competition and to foster a fair marketplace for carriage negotiations."<sup>62</sup> In other words, ACA claims that Congress intended that some sort of "fair" result emerge from retransmission consent negotiations. To the extent that ACA feels such a result might not be "fair" to its members, it is apparently the government's responsibility to impose additional rules until a "fair" result is achieved. Specifically, what ACA deems a "fair" result is either (1) a broadcaster elects must carry, in which case it receives no compensation for its signal, or (2) the broadcaster elects retransmission consent and is powerless to prevent ACA members from importing a duplicating network station, in which case a local broadcaster again receives nothing for its signal.

ACA's rendition of the history of retransmission consent is skewed, and the result it seeks to achieve would be the antithesis of what Congress intended. Congress intended that some broadcasters might appropriately determine that monetary compensation is warranted and suitable.<sup>63</sup> ACA's proposed rules would, in many instances, effectively preclude such compensation. Congress determined that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from

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<sup>62</sup> ACA Petition at 17.

<sup>63</sup> See S. REP. No. 102-92, at 35, *reprinted* in 1992 U.S.C.C.A.N. 1133.

watching broadcast signals,” and it found that the then-existing system required that “broadcasters, in effect, subsidize the establishment of their chief competitors.”<sup>64</sup> ACA’s proposal would perpetuate this subsidy. Congress clearly intended that the government generally, and even the good faith negotiation provision in particular, not “dictate the outcome of the ensuing marketplace negotiations.”<sup>65</sup> ACA’s proposal would precisely dictate the outcome of such negotiations. Accordingly, its proposals should be rejected for these reasons alone.

Currently there are 388 national non-broadcast programming networks.<sup>66</sup> As noted above, ACA’s members have no government-provided right to carry these non-broadcast networks for free. Furthermore, ACA members have no right, if they do not like the license these program providers are offering, or deem them to be “unfair,” to negotiate with an out-of-market cable system to retransmit its channel carrying such non-broadcast programming. Other than the program access provisions relating to vertically-integrated MVPDs, there are no prohibitions or limitations on third party agreements with non-broadcast programming networks that might affect their negotiations with MVPDs. ACA has completely failed to justify the discriminatory treatment of broadcasters—not applicable to non-broadcast programming networks—that would result from adoption of its proposals.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 36.

<sup>66</sup> *See Eleventh Annual Report* at ¶ 15.

If only ACA were to abide the lesson embodied in its own quotation from the Commission's 1988 *Syndex Order*: "Competition is generally far more reliable than regulation for fostering fair and efficient use of the means of mass communication."<sup>67</sup>

### **Conclusion**

For the foregoing reasons, ACA's proposals are unsupported by any valid factual, legal, or policy justifications. These proposals would cripple the program exclusivity and retransmission consent rules necessary to protect our system of locally-based television


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<sup>67</sup> ACA Petition at 13 (quoting *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988), at ¶ 51) (emphasis added by ACA).


broadcasting and would impermissibly restrict broadcasters' freedom to contract. The Petition should, accordingly, be denied.

Respectfully submitted,


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LICENSE CO., AND THE ABC, CBS, FBC, AND NBC  
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April 18, 2005

## CERTIFICATE OF SERVICE

I, Angela Barber, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Opposition to American Cable Association Petition for Rulemaking was sent this 18<sup>th</sup> day of April, 2005, by first class mail, postage prepaid to the following:

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Angela Barber

## **APPENDIX A**

**Cable Subscriber Data:**

**Top 5 Cable Systems in Markets 101+**

**Cable Subscriber Data<sup>45</sup>**

Number of Cable Subscribers in Markets 101+  
Based on Top 5 Cable Systems in Each Market

Subscribers, All Owners: 7,596,490

Subscribers, Top 5 U.S. MSOs: 4,144,771

1	Comcast	1,247,252
2	Time Warner	720,284
3	Charter	1,167,223
4	Cox	862,844
5	Adelphia	147,168

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<sup>45</sup> Cable Data Corporation, February 2004.



## **APPENDIX B**

**Estimated TV Households Density by Market**

David Gunzerath, Ph.D.  
Vice President, Research & Information Group  
National Association of Broadcasters

March 1, 2005

**Estimated TV Households per Square Mile by Nielsen DMA**

Rank	DMA	TV Households	Sq. Miles	Households per Sq. Mile
1	NEW YORK	7,355,710	11424	644
2	LOS ANGELES	5,431,140	30478	178
3	CHICAGO	3,417,330	9349	366
4	PHILADELPHIA	2,919,410	7982	366
5	BOSTON (MANCHESTER)	2,391,840	9275	258
6	SAN FRANCISCO-OAK-SAN JOSE	2,359,870	10860	217
7	DALLAS-FT. WORTH	2,292,760	25704	89
8	WASHINGTON, DC(HAGRSTWN)	2,241,610	12480	180
9	ATLANTA	2,059,450	17212	120
10	DETROIT	1,943,930	6139	317
11	HOUSTON	1,902,810	17378	109
12	SEATTLE-TACOMA	1,690,640	25769	66
13	TAMPA-ST. PETE (SARASOTA)	1,671,040	7990	209
14	MINNEAPOLIS-ST. PAUL	1,665,540	42217	39
15	PHOENIX (PRESCOTT)	1,596,950	80322	20
16	CLEVELAND-AKRON (CANTON)	1,556,670	7798	200
17	MIAMI-FT. LAUDERDALE	1,496,810	2202	680
18	DENVER	1,401,760	116673	12
19	SACRAMENTO-STOKTON-MODESTO	1,315,030	16973	77
20	ORLANDO-DAYTONA BCH-MELBRN	1,303,150	8222	159
21	ST. LOUIS	1,216,700	17216	71
22	PITTSBURGH	1,186,010	10408	114
23	BALTIMORE	1,087,730	3826	284
24	PORTLAND, OR	1,086,900	48259	23
25	INDIANAPOLIS	1,053,020	12290	86
26	SAN DIEGO	1,025,730	4200	244
27	HARTFORD & NEW HAVEN	1,017,530	4219	241
28	CHARLOTTE	1,004,440	10370	97
29	RALEIGH-DURHAM (FAYETVILLE)	966,720	11952	81
30	NASHVILLE	916,170	20383	45
31	KANSAS CITY	894,580	17968	50
32	MILWAUKEE	886,770	4574	194
33	CINCINNATI	883,230	7469	118
34	COLUMBUS, OH	867,490	9660	90

**Estimated TV Households per Square Mile by Nielsen DMA**

35	GREENVLL-SPART-ASHEVLL-AND	813,210	13087	62
36	SALT LAKE CITY	800,000	136670	6
37	SAN ANTONIO	748,950	29552	25
38	GRAND RAPIDS-KALMZOO-B.CRK	732,600	8871	83
39	WEST PALM BEACH-FT. PIERCE	729,010	2405	303
40	BIRMINGHAM (ANN, TUSC)	717,300	15209	47
41	NORFOLK-PORTSMTH-NEWPT NWS	707,750	5171	137
42	HARRISBURG-LNCSTR-LEB-YORK	702,590	5940	118
43	NEW ORLEANS	675,760	8487	80
44	MEMPHIS	658,250	15811	42
45	OKLAHOMA CITY	655,250	30322	22
46	BUFFALO	651,970	8510	77
47	ALBUQUERQUE-SANTA FE	649,680	106325	6
48	GREENSBORO-H.POINT-W.SALEM	648,860	7375	88
49	PROVIDENCE-NEW BEDFORD	644,980	1601	403
50	LOUISVILLE	637,680	9582	67
51	LAS VEGAS	614,150	36691	17
52	JACKSONVILLE	613,000	8796	70
53	WILKES BARRE-SCRANTON	592,560	10517	56
54	AUSTIN	567,870	10438	54
55	ALBANY-SCHENECTADY-TROY	555,640	10035	55
56	DAYTON	537,710	5272	102
57	LITTLE ROCK-PINE BLUFF	531,770	24900	21
58	FRESNO-VISALIA	527,770	17693	30
59	KNOXVILLE	513,630	9221	56
60	TULSA	510,960	16698	31
61	RICHMOND-PETERSBURG	509,860	8935	57
62	CHARLESTON-HUNTINGTON	508,750	14288	36
63	MOBILE-PENSACOLA (FT WALT)	492,070	9737	51
64	LEXINGTON	481,120	12316	39
65	FLINT-SAGINAW-BAY CITY	479,520	7733	62
66	WICHITA-HUTCHINSON PLUS	445,690	57013	8
67	ROANOKE-LYNCHBURG	445,670	12184	37
68	FT. MYERS-NAPLES	444,130	6086	73
69	GREEN BAY-APPLETON	433,640	10492	41

**Estimated TV Households per Square Mile by Nielsen DMA**

70	TOLEDO	432,430	5516	78
71	HONOLULU	417,120	6409	65
72	TUCSON (SIERRA VISTA)	417,070	16593	25
73	DES MOINES-AMES	412,230	19534	21
74	PORTLAND-AUBURN	409,060	10750	38
75	ROCHESTER, NY	396,880	2219	179
76	OMAHA	396,460	12891	31
77	SYRACUSE	395,400	4383	90
78	SPRINGFIELD, MO	388,530	20303	19
79	PADUCAH-CAPE GIRARD-HARSBG	384,860	17510	22
80	SPOKANE	384,060	52176	7
81	SHREVEPORT	382,700	19435	20
82	CHAMPAIGN&SPRNGFLD-DECATUR	382,460	11838	32
83	COLUMBIA, SC	374,680	7121	53
84	HUNTSVILLE-DECATUR (FLOR)	370,160	7542	49
85	MADISON	364,000	8471	43
86	CHATTANOOGA	353,210	5964	59
87	SOUTH BEND-ELKHART	332,860	4457	75
88	CEDAR RAPIDS-WTRLO-IWC&DUB	331,610	12848	26
89	TRI-CITIES, TN-VA	329,910	7119	46
90	BURLINGTON-PLATTSBURGH	329,200	14503	23
91	JACKSON, MS	327,670	14078	23
92	COLORADO SPRINGS-PUEBLO	313,170	24768	13
93	HARLINGEN-WSLCO-BRNSVL-MCA	312,300	4295	73
94	DAVENPORT-R.ISLAND-MOLINE	309,900	9527	33
95	WACO-TEMPLE-BRYAN	308,970	12090	26
96	BATON ROUGE	306,910	6388	48
97	JOHNSTOWN-ALTOONA	300,850	8313	36
98	SAVANNAH	293,170	9145	32
99	EVANSVILLE	289,840	8361	35
100	EL PASO (LAS CRUCES)	288,440	13204	22
	<b>Average, Markets 1-100</b>			<b>98</b>

**Estimated TV Households per Square Mile by Nielsen DMA**

101	CHARLESTON, SC	282,740	5396	52
102	YOUNGSTOWN	281,340	2236	126
103	LINCOLN & HASTINGS-KRNY	275,230	38065	7
104	FT. WAYNE	271,890	4791	57
105	GREENVILLE-N.BERN-WASHNGTN	270,200	8278	33
106	SPRINGFIELD-HOLYOKE	267,500	1849	145
107	FT. SMITH-FAY-SPRNGDL-RGRS	267,030	8899	30
108	MYRTLE BEACH-FLORENCE	265,370	5136	52
109	TALLAHASSEE-THOMASVILLE	259,720	10389	25
110	LANSING	259,240	3012	86
111	TYLER-LONGVIEW(LFKN&NCGD)	254,170	8897	29
112	TRAVERSE CITY-CADILLAC	249,450	15052	17
113	MONTGOMERY-SELMA	247,800	12186	20
114	RENO	246,700	51102	5
115	AUGUSTA	246,620	7859	31
116	SIOUX FALLS(MITCHELL)	242,930	48200	5
117	PEORIA-BLOOMINGTON	242,020	6262	39
118	FARGO-VALLEY CITY	235,490	40723	6
119	MACON	230,000	8309	28
120	EUGENE	229,360	11868	19
121	SANTABARBRA-SANMAR-SANLUOB	224,710	3304	68
122	BOISE	223,890	32734	7
123	LAFAYETTE, LA	220,740	5659	39
124	MONTEREY-SALINAS	218,450	5156	42
125	COLUMBUS, GA	208,860	6896	30
126	YAKIMA-PASCO-RCHLND-KNNWCK	207,180	16057	13
127	LA CROSSE-EAU CLAIRE	206,490	10088	20
128	BAKERSFIELD	194,180	4070	48
129	CORPUS CHRISTI	193,290	11530	17
130	AMARILLO	190,120	42971	4
131	CHICO-REDDING	189,310	16813	11
132	COLUMBUS-TUPELO-WEST POINT	187,650	9577	20
133	WAUSAU-RHINELANDER	181,780	10787	17
134	ROCKFORD	181,180	2843	64
135	MONROE-EL DORADO	176,380	11352	16

**Estimated TV Households per Square Mile by Nielsen DMA**

136	DULUTH-SUPERIOR	175,030	23347	7
137	TOPEKA	171,470	11708	15
138	BEAUMONT-PORT ARTHUR	168,740	4947	34
139	COLUMBIA-JEFFERSON CITY	167,390	8155	21
140	WILMINGTON	163,560	3736	44
141	MEDFORD-KLAMATH FALLS	162,260	26419	6
142	ERIE	158,910	2698	59
143	SIOUX CITY	157,340	13302	12
144	WICHITA FALLS & LAWTON	156,300	14570	11
145	LUBBOCK	152,620	16898	9
146	JOPLIN-PITTSBURG	152,310	8320	18
147	ALBANY, GA	151,970	6330	24
148	BLUEFIELD-BECKLEY-OAK HILL	148,760	6043	25
149	TERRE HAUTE	146,860	5906	25
150	SALISBURY	146,510	2673	55
151	BANGOR	144,740	16174	9
152	WHEELING-STEUBENVILLE	144,330	3407	42
153	ROCHESTR-MASON CITY-AUSTIN	142,570	6756	21
154	BINGHAMTON	141,350	3566	40
155	ANCHORAGE	139,960	42392	3
156	BILOXI-GULFPORT	137,590	2944	47
157	MINOT-BISMARCK-DICKINSON	135,760	58898	2
158	ODESSA-MIDLAND	135,450	33642	4
159	PALM SPRINGS	135,190	2402	56
160	PANAMA CITY	134,770	6301	21
161	SHERMAN-ADA	123,540	8584	14
162	GAINESVILLE	116,670	3046	38
163	ABILENE-SWEETWATER	112,950	15031	8
164	IDAHO FALLS-POCATELLO	112,700	29627	4
165	CLARKSBURG-WESTON	109,480	5105	21
166	UTICA	106,690	2414	44
167	QUINCY-HANNIBAL-KEOKUK	105,070	8156	13
168	HATTIESBURG-LAUREL	104,800	4747	22
169	MISSOULA	103,810	17294	6
170	BILLINGS	102,370	52461	2

**Estimated TV Households per Square Mile by Nielsen DMA**

171	YUMA-EL CENTRO	99,490	9689	10
172	DOTHAN	98,850	3470	28
173	ELMIRA (CORNING)	98,270	3263	30
174	JACKSON, TN	94,770	3145	30
175	WATERTOWN	94,390	5233	18
176	ALEXANDRIA, LA	94,350	4752	20
177	LAKE CHARLES	94,240	4309	22
178	RAPID CITY	93,220	40348	2
179	JONESBORO	93,100	5599	17
180	MARQUETTE	91,100	11276	8
181	HARRISONBURG	85,550	2519	34
182	BOWLING GREEN	81,470	2881	28
183	GREENWOOD-GREENVILLE	78,160	5223	15
184	MERIDIAN	72,280	5127	14
185	CHARLOTTESVILLE	69,930	1488	47
186	LAFAYETTE, IN	65,060	1271	51
187	PARKERSBURG	64,790	1133	57
188	GREAT FALLS	64,650	40296	2
189	GRAND JUNCTION-MONTROSE	63,650	5568	11
190	LAREDO	62,720	4354	14
191	TWIN FALLS	59,940	10432	6
192	EUREKA	58,380	4580	13
193	BUTTE-BOZEMAN	57,680	17173	3
194	LIMA	54,200	888	61
195	CHEYENNE-SCOTTSBLUFF	53,920	5651	10
196	SAN ANGELO	53,530	14181	4
197	BEND, OR	52,550	3018	17
198	CASPER-RIVERTON	51,850	23021	2
199	MANKATO	51,390	1755	29
200	OTTUMWA-KIRKSVILLE	51,190	5141	10
201	ST. JOSEPH	48,740	2123	23
202	ZANESVILLE	33,240	665	50
203	PRESQUE ISLE	31,840	6672	5
204	FAIRBANKS	31,640	7366	4
205	VICTORIA	30,180	883	34



**Estimated TV Households per Square Mile by Nielsen DMA**

206	HELENA	25,360	4652	5
207	JUNEAU	25,070	2717	9
208	ALPENA	17,930	1249	14
209	NORTH PLATTE	15,590	6133	3
210	GLENDIVE	5,150	5730	1
	<b>Average, Markets 101-210</b>			<b>25</b>

## **APPENDIX B**

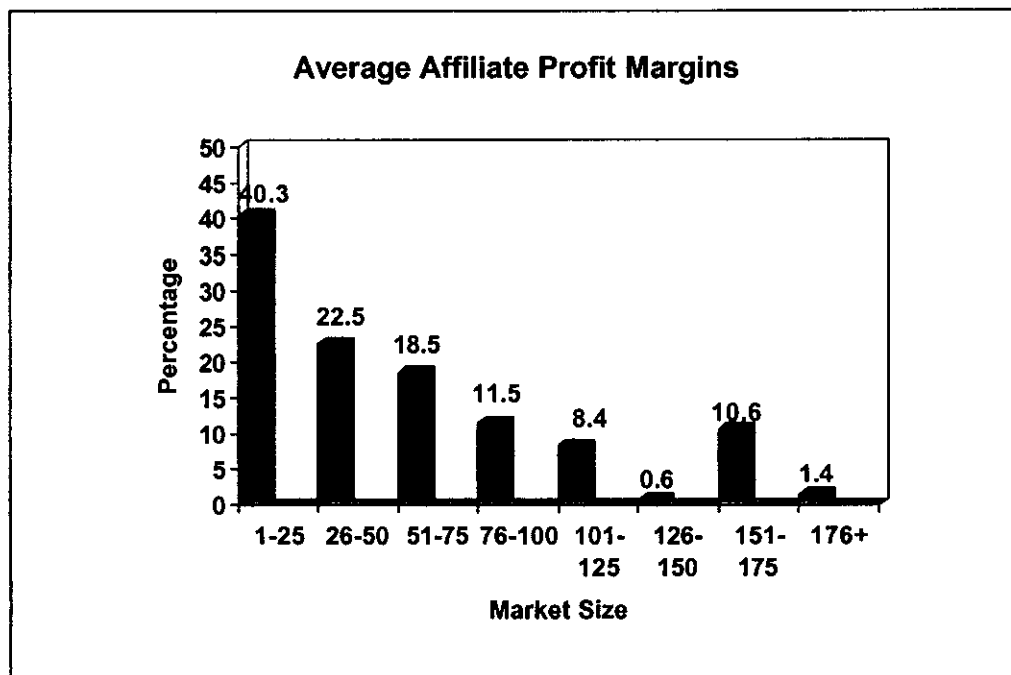
### **Financial Condition of Small Market Network Affiliated Television Stations**

## **APPENDIX C**

**Financial Condition of Small Market  
Network Affiliated Television Stations**

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National Association of Broadcasters  
March 1, 2005**

In 2003, the profit margins of small market television stations affiliated with the four major networks (i.e., those in markets of DMA ranking of 100+) paled in comparison to those of the larger markets. In particular, stations in market sizes 126-150 and 176+ experienced stagnant growth. Stations in markets 101-125 and 151-175, although faring better, still trailed behind the larger markets in terms of profitability. Greater competition from other forms of media, as well as declining network compensation and increased news expenses, helped to contribute to the lower profit margins of these small market stations. Results from the *2004 NAB/BCFM Television Financial Survey*, demonstrate the declining profitability as you move from larger to smaller markets.<sup>1</sup> (See figure below.)



<sup>1</sup> Results obtained from the *2004 NAB/BCFM Television Financial* database and include affiliate stations: ABC, CBS, FOX, and NBC.

The table below displays the actual net revenues and pre-tax profits for the average network affiliated station in each of these eight categories.

<b>2003 Net Revenues and Pre-Tax Profits<sup>2</sup></b>		
<b>Average Affiliate</b>		
<b>DMAs</b>	<b>Net Revs (000s)</b>	<b>Profits (000s)</b>
1-25	\$70,142	\$28,235
26-50	23,830	5,358
51-75	14,117	2,611
76-100	10,311	1,184
101-125	7,332	616
126-150	5,353	30
151-175	4,484	475
176+	2,801	39

A similar study conducted in 2002, "The Declining Financial Position of Television Stations in Small and Medium Markets,"<sup>3</sup> also emphasized the tenuous financial stature of small market stations as compared to large market stations. This study not only demonstrated the declining profitability of small market stations, but also the particularly difficult financial situations of those affiliated stations that were not the highest rated stations in their respective markets. The data presented in that report made clear that many stations in the smaller markets are struggling to achieve profitability.

<sup>2</sup> *Net Revenues* is defined as the total gross advertising revenues, plus network compensation, trade-outs, barter and other broadcast related revenues, minus agency and rep commissions.

*Pre-Tax Profits* is defined as cash flow minus depreciation & amortization & interest.

<sup>3</sup> See Comments of the National Association of Broadcasters, MB Docket 02-277, Jan. 2, 2003. Attachment C.